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Nos. 03-1230, 03-1234, and 03-1250

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In the Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., AND USF HOLLAND, INC., PETITIONERS

v.

MICHIGAN PUBLIC SERVICE COMMISSION, ET AL.

MID-CON FREIGHT SYSTEMS, INC., ET AL., PETITIONERS

v.

MICHIGAN PUBLIC SERVICE COMMISSION, ET AL.

TROY CAB, INC., ET AL., PETITIONERS

v.

MICHIGAN PUBLIC SERVICE COMMISSION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

JEFFREY A. ROSEN
General Counsel

PAUL M. GEIER
Assistant General Counsel for Litigation

DALE C. ANDREWS
Deputy Assistant General Counsel for Litigation

PAUL S. SMITH
Senior Trial Attorney

BRIGHAM A. MCCOWN
Chief Counsel
Federal Motor Carrier Safety Administration
Department of Transportation
Washington, D.C. 20590

PETER D. KEISLER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

DARYL JOSEFFER
Assistant to the Solicitor General

MARK B. STERN
SUSHMA SONI
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

The State of Michigan imposes upon motor carriers licensed in that State a $100 annual fee for each vehicle registered in the State and "operating entirely in interstate commerce." Mich. Comp. Laws Ann. § 478.2(2) (West 2002). Michigan also imposes upon motor carriers a $100 annual fee for each vehicle that operates at least in part in intrastate transportation. *Id.* § 478.2(1). The questions presented are:

(1) Whether the $100 fee upon vehicles operating solely in interstate commerce is preempted by 49 U.S.C. 14504.

(2) Whether the $100 fee upon vehicles conducting intrastate operations violates the Commerce Clause of the United States Constitution.

(3) Whether the $100 fee upon vehicles conducting intrastate operations is preempted by 49 U.S.C. 14501.

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This brief is submitted in response to the orders of this Court inviting the Acting Solicitor General to express the views of the United States. Because all three petitions challenge the same decision of the Michigan Court of Appeals, this consolidated brief responds to all of the Court's orders.

STATEMENT

1. a. In 1965, Congress authorized States to impose registration requirements on interstate motor carriers operating within their borders. 49 U.S.C. 302(b)(2) (1970). Congress determined that such requirements would not constitute undue burdens on interstate commerce insofar as they were consistent with regulations promulgated by the Interstate Commerce Commission (ICC). *Ibid.*; *Yellow Transp., Inc.* v. *Michigan*, 537 U.S. 36, 39 (2002).

Until 1994, the ICC permitted each State to charge an interstate motor carrier operating within its borders an annual registration fee of up to $10 per vehicle. 49 C.F.R. 1023.33 (1992). This became known as the "bingo card" system because each State issued a stamp for each vehicle, and the motor carrier affixed the stamp to a card carried in the vehicle, as proof of registration. 49 C.F.R. 1023.32 (1992); *Yellow Transp.*, 537 U.S. at 39.

In order to reduce administrative burdens on motor carriers, Congress directed the ICC in 1991 to implement a new system, called the Single State Registration System (SSRS), under which each motor carrier "register[s] annually with only one State." 49 U.S.C. 14504(c)(1)(A).[1] Under the SSRS, each State may still charge a fee, "equal to the

[1] The 39 States that participated in the bingo card system as of January 1, 1991, are eligible to participate in the SSRS. 49 U.S.C. 14504(c)(2)(D). The 11 ineligible States are listed in H.R. Rep. No. 171, 102d Cong., 1st Sess. Pt. 1, at 49 (1991). Oregon is eligible to participate but does not do so. Thus, 38 States participate in the single-state program.

fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991." 49 U.S.C. 14504(c)(2)(B)(iv)(III). Those fees are collected and distributed to other States by the single State in which the vehicle is registered. 49 C.F.R. 367.6(a).

Congress determined that "[t]he charging or collection of any fee under this section that is not in accordance with th[is] fee system * * * shall be deemed to be a burden on interstate commerce." 49 U.S.C. 14504(c)(2)(C). When Congress abolished the ICC in 1995, it assigned authority to administer the SSRS to the Secretary of Transportation. *Yellow Transp.*, 537 U.S. at 39-40 n.* (citing Pub. L. No. 104-88, 109 Stat. 803).

b. Section 601 of the Federal Aviation Administration Authorization Act of 1994 (FAAAA), Pub. L. No. 103-305, 108 Stat. 1605, forbids a State from "enact[ing] or enforc[ing] a law, regulation, or other provision * * * related to a price, route, or service of any motor carrier * * * with respect to the transportation of property." 49 U.S.C. 14501(c)(1). Congress enacted that provision out of concern that "'the regulation of intrastate transportation of property by the States' unreasonably burdened free trade, interstate commerce, and American consumers." *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 440 (2002) (quoting § 601(a)(1), 108 Stat. 1605). Congress specified that Section 601 does not restrict "the safety regulatory authority of a State with respect to motor vehicles," the "authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements," or other regulatory authority regarding the transportation of household goods or non-consensual tow truck services. 49 U.S.C. 14501(c)(2).

2. Michigan imposes three relevant fees on motor carriers. First, under the SSRS, Michigan charges interstate carriers operating in Michigan a maximum annual fee of $10 for each truck licensed in *another* State. Mich. Comp. Laws Ann. § 478.7(4) (West 2002).[2] That fee is not at issue here. Second, "[a] motor carrier licensed in [Michigan] shall pay an annual fee of $100.00 for each vehicle operated by the motor carrier *which is registered in [Michigan]* and operating entirely in interstate commerce." *Id.* § 478.2(2) (the "interstate fee") (emphasis added). Third, Michigan also charges an annual fee of $100 "for each self-propelled motor vehicle operated by or on behalf of [a] motor carrier." Mich. § 478.2(1) (the "intrastate fee"). In practice, Michigan assesses that fee only on trucks that engage in whole or in part in intrastate operations in Michigan. 03-1234 Br. in Opp. App. 8b.

3. In 1995, petitioner Westlake Transportation brought a class action against respondents, alleging that the $100 intrastate and interstate fees are preempted by 49 U.S.C. 14501 and 14504. Shortly thereafter, petitioner Troy Cab and other petitioners filed a class action making similar allegations, and petitioners American Trucking Associations and USF Holland filed suit alleging that the intrastate fee violates the Commerce Clause of the United States Constitution, Art. I, § 8, Cl. 3. After all of the petitioners amended their complaints to adopt each others' claims, the Michigan Court of Claims consolidated the cases, certified the classes, and granted summary disposition to respondents. 03-1234 Pet. App. 36- 72.

The Court of Claims determined that the $100 interstate fee is not preempted by federal law because the SSRS "places a $10.00 annual vehicle fee limit on only the 'participating states,' * * * not on the 'registering state,'" and Michigan's $100 interstate fee applies only to vehicles registered in Michigan. 03-1234 Pet. App. 46; accord *id.* at

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[2] As explained above, under the SSRS, that fee is actually collected by the State in which the carrier is registered and then paid over to Michigan. See pp. 1-2, *supra*.

68-69. The court also upheld the intrastate fee against petitioners' Commerce Clause challenge because the fee applies only to carriers that choose to engage in point-to-point transportation of property wi[illegible]n Michigan, and the fee was intended to ensure that vehicles and carriers that provide intrastate service on Michigan highways comply with Michigan's safety and fitness norms. *Id.* at 48-49. Finally, the court held that Section 601 of the FAAAA does not preempt the intrastate fee, noting that Michigan has not used the fees to engage in preempted economic regulation. *Id.* at 44-45.

4. The Michigan Court of Appeals affirmed. 03-1234 Pet. App. 1-35. The Court of Appeals disagreed with the Court of Claims' conclusion that the SSRS imposes no limit on fees charged by the States in which the carrier is registered. "A registration state is simply a participating state in which a motor carrier is registering," the court explained, and the federal statute draws no distinction between the two. *Id.* at 15. Nonetheless, the court held that the interstate fee is not preempted under the SSRS (or the predecessor bingo card system) because it "could reasonably be classified as a regulatory fee," as opposed to a "registration fee." *Id.* at 16; accord *id.* at 19. The court concluded that "[i]f the purpose of a fee is to regulate an industry or service, it can be properly classified as a regulatory fee" exempt from federal preemption. *Id.* at 16-17.

Turning to the intrastate fee, the Court of Appeals concluded that the fee "affects interstate commerce, and thus, implicates the dormant Commerce Clause." 03-1234 Pet. App. 32. The court nonetheless upheld the fee on the theory that it "regulates even-handedly." *Id.* at 34. The court acknowledged petitioners' contention that the fee discriminates against interstate commerce because carriers that travel both intrastate and interstate "invariably will pay a higher per-mile fee than the carrier who operates solely

intrastate," but the court deemed that point insignificant because petitioners "present[ed] no evidence that any trucking firm's route choices are affected by the imposition of the fee." *Id.* at 33-34. The court distinguished this Court's decision in *American Trucking Ass'ns* v. *Scheiner*, 483 U.S. 266 (1987)—which held two unapportioned flat taxes on interstate trucking carriers to be unconstitutional—on the theory that *Scheiner* applies only to taxes for the privilege of doing business in the State, not to "regulatory statutes." 03-1234 Pet. App. 32 n.15.

The Court of Appeals also held that the intrastate fee is not preempted by Section 601 of the FAAAA because there is no evidence that Michigan uses the fees to fund the enforcement of preempted regulations of rates, routes, or services. 03-1234 Pet. App. 21. The court rejected petitioners' argument that the Court of Claims erred by limiting discovery and briefing on that issue. *Id.* at 22-23.

5. The Michigan Supreme Court denied petitioners' application for leave to appeal. 03-1234 Pet. App. 73-75.

DISCUSSION

The $100 fee imposed by Section 478.2(2) of the Michigan statute on carriers that operate solely in interstate commerce is precisely the type of burden on interstate commerce that is prohibited by the Single State Registration System established under 49 U.S.C. 14504. The Michigan Court of Appeals' contrary holding opens a significant loophole in the SSRS, and undermines Congress's efforts to reduce financial and administrative barriers to interstate commerce. Although the separate $100 fee imposed by Section 478.2(1) of the Michigan statute on carriers that engage in at least some point-to-point intrastate transportation in Michigan does not directly implicate the federal statutory scheme, the Court of Appeals' rationale for upholding Section 478.2(1) against dormant Commerce Clause scrutiny is incorrect and difficult to square with decisions of this

Court and the highest courts of other States. If that erroneous rationale is rejected by this Court, however, the validity of the $100 flat fee on interstate carriers that engage in intrastate commerce within Michigan nonetheless presents a difficult and unresolved question that calls for reconciliation of two different strands of this Court's Commerce Clause jurisprudence. Accordingly, the petitions for writs of certiorari in Nos. 03-1234 (Mid-Con) and 03-1230 (American Trucking Associations) should be granted. The petition in No. 03-1250 (Troy Cab) should not be granted because it does not present a substantial question warranting review by this Court.

A. The Court Should Review The Validity Of Michigan's $100 Interstate Fee

By holding that Michigan's $100 fee on carriers that engage only in interstate commerce is not preempted by the SSRS, the Court of Appeals erred on an important question of federal law.

1. Congress enacted the SSRS against the backdrop of this Court's dormant Commerce Clause jurisprudence, which generally prohibits States from discriminating against interstate commerce or otherwise imposing undue burdens on such commerce. See, *e.g.*, *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 579 (1986). Congress determined that requirements that motor carriers engaging in interstate commerce must register with a State, or pay fees for that privilege, would impose undue burdens on interstate commerce *unless* they were undertaken pursuant to the SSRS. 49 U.S.C. 14504(b) ("When a State registration requirement imposes obligations in excess of the standards of the Secretary, the part in excess is an unreasonable burden."); 49 U.S.C. 14504(c)(2)(C) ("The charging or collection of any fee under this section that is not in accordance with th[is] fee system * * * shall be deemed to be a burden on interstate commerce.").

Under the SSRS, a motor carrier is required to register with only one State, and only that State may collect fees on behalf of itself and other participating States. 49 U.S.C. 14504(c)(1)(A) and (2)(A)(iii). The fees are allocated among the participating States in which the carrier operates, 49 C.F.R. 367.6(a), and the amount of the fee collected on behalf of any participating State is "*not to exceed $10 per vehicle.*" 49 U.S.C. 14504(c)(2)(B)(iv)(III) (emphasis added).

The $100 fee imposed by Michigan on carriers engaged solely in interstate commerce in Michigan does not satisfy those requirements. Although Michigan complies with the SSRS with respect to vehicles licensed in *other* States, see Mich. Comp. Laws Ann. § 478.7(4), the $100 fee for vehicles licensed in Michigan is ten times the $10 permitted under the SSRS. As the Court of Appeals correctly recognized, the SSRS draws no distinction between fees charged by the State of registration and fees charged by other States. 03-1234 Pet. App. 15. The $10 cap applies to *every* "participating State," 49 U.S.C. 14504(c)(2)(B)(iv)(III), including the one in which a carrier registers. See 03-1234 Pet. App. 15 ("A registration state is simply a participating state in which a motor carrier is registering."); 49 C.F.R. 367.3(a) ("Each motor carrier required to register and pay filing fees must select a single participating State as its registration State."). Because the $100 interstate fee is prohibited by the SSRS, it is preempted.

The Court of Appeals attempted to elide that conclusion by asserting that the SSRS preempts only "registration" fees, as opposed to "regulatory" fees, and that "the $100 interstate fee could reasonably be classified as a regulatory fee because it is a fee imposed for the administration of [state law]." 03-1234 Pet. App. 16. The court based that conclusion on a state court decision distinguishing between "user fee[s]" and "tax[es]" for purposes of a state-law restriction on the imposition of new taxes by units of local gov-

ernment. *Ibid.* (citing *Bolt* v. *Lansing*, 587 N.W.2d 264, 268 (Mich. 1998)). That state-law distinction is irrelevant to the *federal* question here, and nothing in Section 14504 limits the statute's reach to "registration" fees or fees given any other specific label. Nor does anything in the statute exclude fees dubbed "regulatory." Instead, it prohibits "[t]he charging or collection of *any* fee under this section that is not in accordance with" the SSRS. 49 U.S.C. 14504(c)(2)(C) (emphasis added).

In light of that broad and inclusive statutory language, there is no question the interstate fee is covered by Section 14504. The fee is charged to motor carriers licensed in Michigan for every vehicle "registered in this state and operating entirely in interstate commerce." Mich. § 478.2(2). Because the fee is imposed *solely for registering* to participate in interstate commerce, it is hard to characterize it as anything other than a "registration fee," and in any event it is precisely the type of fee Congress sought to regulate. Indeed, Michigan "waives" the lawful $10 interstate "registration fee" for every truck for which the carrier pays the unlawful $100 fee. 03-1234 Pet. App. 16 n.6. As this practice reflects, the only difference between the SSRS fee and the Michigan interstate fee is the amount.

Moreover, when an interstate carrier pays the $100 fee under Section 478.2(2), respondents assign the carrier a decal that it must display as proof of payment. 03-1234 Br. in Opp. App. 10b. That requirement independently violates the SSRS's prohibition against "decals, stamps, cab cards, or any other means of registering or identifying specific vehicles operated by a motor carrier," 49 C.F.R. 367.5(g); see 49 U.S.C. 14504(c)(2)(B)(iii)—and thereby provides further confirmation that Michigan's interstate fee is the type of fee the SSRS prohibits.

The Court of Appeals erred by relying on repealed ICC regulations, which predated the SSRS, for the proposition

that a State may collect taxes and fees to defray regulatory and law-enforcement costs. 03-1234 Pet. App. 17-18 (citing 49 C.F.R. 1023.104 (1991); 49 C.F.R. 1023.105 (1991)). The question here is not whether a State may impose *any* taxes or fees on motor carriers; instead, the question is whether it may impose fees covered by the SSRS in excess of the amounts permitted by the SSRS. If a State could do so, the SSRS fee caps would be a dead letter.[3]

2. The validity of Michigan's interstate fee warrants this Court's review. Barriers to interstate commerce harm the national economy, contrary to the Framers' intent to create a nationwide "area of trade free from interference by the States." *American Trucking Ass'ns* v. *Scheiner*, 483 U.S. 266, 280 (1987) (quoting *Boston Stock Exch.* v. *State Tax Comm'n*, 429 U.S. 318, 328 (1977)). Congress has twice recognized the importance of minimizing barriers to interstate trucking, first when it enacted the bingo card system, and later when it replaced that system with the SSRS. 49 U.S.C. 302(b)(2) (1970); 49 U.S.C. 14504(b) and (c)(2)(C); see *Yellow Transp.*, 537 U.S. at 39-40. The decision below strikes at the heart of Congress's design by sanctioning increased monetary and administrative barriers to the conduct of interstate commerce. This Court has granted certiorari in numerous other cases raising similar interstate commerce concerns, even in the absence of an asserted conflict among appellate courts. See, *e.g.*, *Hillside Dairy, Inc.* v. *Lyons*, 539 U.S. 59 (2003); *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564 (1997); *General Motors* v. *Tracy*, 519 U.S.

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[3] States remain free to collect other taxes and exactions, such as fuel taxes and tolls, that are related to the extent of a carrier's use of their roads. In contrast to the flat fee at issue here, imposed solely for registration to engage in interstate commerce, those taxes do not fall within the scope of Section 14504. Nor do such charges burden interstate commerce to the extent that flat fees do. See pp. 12-13, 16-17, *infra*.

278 (1997); *Trinova Corp.* v. *Michigan Dep't of Treasury*, 498 U.S. 358 (1991); *Scheiner*, *supra*.

In this case, moreover, there is a division in authority because other courts have correctly rejected efforts to circumvent the fee cap. 03-1234 Pet. 18. Especially apposite is *State ex rel. Sammons Trucking Inc.* v. *Boedecker*, 492 P.2d 919, 919-920 (Mont. 1972), where the Supreme Court of Montana held that a $10 "license fee" was preempted by the bingo card system, which imposed a $5 cap at the time. Respondents contend (03-1234 Br. in Opp. 15) that *Boedecker* is distinguishable because it involved a "*registration* fee" as opposed to a "*regulatory* fee." As explained above (see pp. 7-8, *supra*), 49 U.S.C. 14504 does not draw such a distinction.[4] In any event, the fee imposed by Michigan is as much a registration fee as the one in *Boedecker*. The fee is imposed on carriers that are licensed in Michigan for each vehicle that is "*registered* in the state and operating entirely in interstate commerce." Mich. § 478.2(2) (emphasis added); see p. 8, *supra*.

Thus, the validity of the "regulatory fee"/"registration fee" distinction is part and parcel of the issue on which courts have divided.[5] If the distinction between regulatory and registration fees has no role to play in a proper interpretation of the statute, then it equally provides no basis to distinguish *Boedecker*. Moreover, that illusory distinction serves only to underscore the mischief the decision below could cause. If other States attempted to exempt themselves from the SSRS by invoking the "regulatory fee" label, "commerce among the States would be deterred." *Scheiner*, 483 U.S. at 284. Review in No. 03-1234 is therefore warranted.

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[4] The court in *Boedecker* actually referred to the fee as a "license fee," 492 P.2d at 919, and it did not attach significance to nomenclature.

[5] Courts have also divided on the validity of the distinction in evaluating Commerce Clause claims. See pp. 14-15, *infra*.

3. If the Court grants review, however, it might wish to reformulate the question presented by limiting it to whether the SSRS preempts the fee imposed by Section 478.2(2). Petitioners' question encompasses both whether the SSRS preempts the interstate fee *and* whether the predecessor bingo card system had that effect before it was repealed a decade ago, in 1994. 03-1234 Pet. i. Although a similar analysis applies to both the SSRS and the bingo card system, and an understanding of the bingo card system provides helpful background for understanding the SSRS, the two sets of statutes and regulations are worded differently.[6] The preemptive effect of the bingo card system has some importance to the parties to this case because petitioners have sought a refund of fees paid before 1994 (03-1234 Pet. 7-8), but it does not appear to have any other ongoing significance.

B. The Validity Of Michigan's $100 Intrastate Fee Under The Commerce Clause Also Warrants This Court's Review

Petitioners in No. 03-1230 contend that the fee imposed by Section 478.2(1) of the Michigan statute is unconstitutional as applied to carriers that conduct both interstate and

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[6] Congress authorized the ICC to promulgate standards regarding registration and identification of vehicles operating interstate, and provided that requirements in excess of those standards would constitute an undue burden on interstate commerce. 49 U.S.C. 302(b)(2) (1970). The ICC's standards established the bingo card system described at p. 1, *supra*, and, at the times relevant to this case, specified that the fee for issuance of an identification stamp "shall not exceed $10." 49 C.F.R. 1023.33 (1992). Both the statute and the regulations stressed that they should not "be construed to affect the powers of taxation of the several States." 49 U.S.C. 302(b)(1) (1970); see 49 C.F.R. 1023.104 (1992). Although it might be contended that the latter provisions make the federal preemption issue different under the bingo card system than under the SSRS, the interstate fee was preempted under the bingo card system because it was precisely the type of fee regulated by that system, and it exceeded the lawful amount.

intrastate operations. 03-1230 Pet. i. In our view, that issue also warrants this Court's review.

1. The fee imposed by Section 478.2(1) affects interstate commerce. Interstate carriers that transport even one load between two points in Michigan, as part of their overall interstate operations, are assessed the full $100 intrastate fee. Thus, a truck that is passing through Michigan, in the course of an interstate haul, cannot "top off" by transporting an additional load between two points within the State unless it has paid the $100 fee. Similarly, a truck that has just completed an interstate delivery in Michigan cannot make a haul between two points in Michigan on its return trip unless it has paid the full $100 annual fee. See generally 03-1234 Pet. App. 34. As the Court of Appeals correctly recognized, the $100 fee "affects interstate commerce, and thus, implicates the dormant Commerce Clause." *Id.* at 32; see *Camps Newfound/Owatonna*, 520 U.S. at 573; *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 615-617 (1981).

2. Under the Commerce Clause, a state tax is constitutional insofar as it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 183 (1995) (quoting *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977)). Petitioners contend (03-1230 Pet. 7-17, 20-27) that the fee imposed by Section 478.2(1) violates that test because it is not fairly apportioned and it discriminates against interstate commerce.

Petitioners rely in particular on *Scheiner*, *supra*. See 03-1230 Pet. 8-17. In that case, the Court held that two flat taxes (an identification marker fee and an axle tax) imposed by Pennsylvania on interstate trucking carriers for the privilege of using the Commonwealth's highways were unconstitutional, noting that "[i]f each State imposed flat taxes for

the privilege of making commercial entrances into its territory, there is no conceivable doubt that commerce among the States would be deterred." 483 U.S. at 284. The Court explained that the "inevitable effect" of such taxes "is to threaten the free movement of commerce by placing a financial barrier around the State." *Ibid.* The Court distinguished such flat taxes from other exactions, such as fuel taxes, that are fairly apportioned because they are related to the carrier's actual usage of a State's roads, and thereby "maintain state boundaries as a neutral factor in economic decisionmaking." *Id.* at 283.[7]

3. Because the Michigan statute imposes a flat fee of $100 per vehicle for the privilege of doing business within the State, regardless of the amount of intrastate transportation a vehicle actually performs in the State, petitioners contend that its impact is similar to that of the taxes struck down in *Scheiner*. The Michigan Court of Appeals held that *Scheiner* is inapposite on the ground that this case involves what the court characterized as "regulatory statutes," as opposed to "state-taxation statutes that tax interstate commerce itself, i.e., taxes for the privilege of doing business in the state." 03-1234 Pet. App. 32 n.15 (citation omitted). This Court, however, has rejected "the old absolutism" that proscribed "taxation formally levied on interstate commerce." *Jefferson Lines*, 514 U.S. at 183. What matters is "not the formal language of the tax statute but rather its practical effect." *Ibid.* In substance and effect, the distinction drawn by the

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[7] *Scheiner* drew on "[a] line of cases invalidating unapportioned flat taxes." 483 U.S. at 284 n.16. In *Nippert* v. *Richmond*, 327 U.S. 416 (1946), for example, this Court re-affirmed its cases holding flat fees imposed on solicitors or "drummers" (essentially salespersons) acting on behalf of interstate concerns to be unconstitutional. The Court explained that because such taxes bear "no relation to the volume of business done or of returns from it," their burden "will be felt more strongly by the out-of-state itinerant than by the one who confines his movement within the State." *Id.* at 427, 430.

Court of Appeals is meaningless: the intrastate fee is in effect a tax "for the privilege of doing business in the state" because an interstate carrier cannot make intrastate hauls in the State without paying the fee; whether the fee is characterized as "regulatory" has no bearing on its practical effect.

The Court of Appeals' attempt to distinguish *Scheiner* by characterizing the fee as "regulatory" brought it into conflict with the highest courts of New Jersey, Maine, and Massachusetts. Each of those courts expressly rejected the distinction between "regulatory fees" and other sorts of fees or taxes, and each held that a flat tax on the transportation of hazardous waste was unconstitutional under *Scheiner* as a matter of law. *American Trucking Ass'ns* v. *New Jersey*, 852 A.2d 142, 164 (N.J. 2004); *American Trucking Ass'ns* v. *Secretary of State*, 595 A.2d 1014, 1015-1017 (Me. 1991); *American Trucking Ass'ns* v. *Secretary of Admin.*, 613 N.E.2d 95, 99 n.9, 101-103 (Mass. 1993).[8]

In contrast, other courts have credited the erroneous "regulatory fee" distinction relied upon by the Michigan court. See, *e.g.*, *Franks & Son, Inc.* v. *Washington*, 966 P.2d 1232, 1240 (Wash. 1998) (citing cases); cf. *New Jersey*, 852 A.2d at 162-163 (recognizing the conflict and deepening it by "respectfully disagree[ing]" with *Franks & Son* and other cases).

[8] Respondents seek to distinguish those cases on the ground that the fees at issue applied to both intrastate and interstate movements of hazardous waste, whereas the Michigan fee applies only to intrastate shipments. See 03-1230 Br. in Opp. 25. As explained at pp. 16-17, *infra*, that distinction is debatable as applied to interstate trucking carriers. The important point for present purposes is that although the decisions cited in the text held that *Scheiner* applies to state exactions whether they are characterized as "regulatory" fees or some other sort of fee or tax, the Michigan Court of Appeals embraced that very distinction and held *Scheiner* (and *Complete Auto*) inapplicable solely because it regarded Section 478.2(1) as a regulatory statute. See 03-1234 Pet. App. 32 n.15. It is perhaps significant, moreover, that the New Jersey, Maine, and Massachusetts courts did not strike down the fees only as applied to movements solely in interstate commerce, as the logic of respondents' distinction would seem to dictate. See 595 A.2d at 1018 (declaring fee unconstitutional in its entirety); 613 N.E.2d at 105 (same); 852 A.2d at 145, 167 (declaring fee unconstitutional as applied to out-of-state companies).

4. Although the Court of Appeals erred—and departed from decisions of other appellate courts—by relying on the "regulatory fee" distinction, respondents argue (03-1230 Br. in Opp. 17, 22) that *Scheiner* poses no barrier to their collection of the fee for a different reason: that while the taxes at issue in *Scheiner* applied to all trucks traveling within the State, the fee imposed by Section 478.2(1) applies only to trucks undertaking at least some point-to-point intrastate hauls in Michigan, and presents no danger of multiple taxation of those hauls.

That contention finds support in an older line of this Court's cases that subjected flat taxes on transportation companies' intrastate routes to more relaxed scrutiny than taxes on their interstate routes. In *Osborne* v. *Florida*, 164 U.S. 650, 653-654 (1897), for example, this Court assumed that a flat license tax on express companies would have been unconstitutional if applied to companies undertaking solely interstate deliveries, but upheld the tax as applied to companies undertaking both intrastate and interstate deliveries on the theory that the State could tax the intrastate activity. Noting that a "company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce," the Court likewise upheld a partially-flat tax against companies operating railroad sleeping cars that carried both intrastate and interstate passengers in the same cars. *Pullman Co.* v. *Adams*, 189 U.S. 420, 422 (1903).[9]

[9] The Court similarly upheld a flat tax on all vehicles using Illinois' highways on the theory that "each of the [plaintiff] interstate carriers does an intrastate business as well," and "[n]o effort is made to show that * * * the tax is increased by reason of the interstate operations of any appellant." *Bode* v. *Barrett*, 344 U.S. 583, 585 (1953); cf. *City of Chicago* v. *Willett Co.*, 344 U.S. 574, 580 (1953) (upholding flat tax on trucks used to

The continued vitality of those older decisions may be subject to question in light of this Court's decisions in *Complete Auto* and *Scheiner*, which overruled a number of earlier formalist decisions in favor of a more practical framework focusing on the actual effect of a tax. See 430 U.S. at 287-289; 483 U.S. at 292-296. Under this Court's modern precedents, Michigan's fee is constitutional only if it is fairly apportioned, non-discriminatory, and fairly related to the services provided by the State. *Jefferson Lines*, 514 U.S. at 183.[10] *Scheiner* determined that the unapportioned flat taxes at issue in that case were "blatantly discriminatory" and not "even hand[ed]" as applied to out-of-state trucking carriers because they bore no relationship to a carrier's actual use of the State's roads, and thereby "threaten[ed] the free movement of commerce by placing a financial barrier around the State." 483 U.S. at 282, 284, 292; see pp. 12-13, *supra*. Similar concerns may be raised by Michigan's intrastate fee under Section 478.2(1) insofar as it is imposed on carriers engaged in interstate as well as intrastate commerce, because the cost-per-mile incurred by those carriers for engaging in intrastate commerce within Michigan would generally be higher than the cost-per-mile incurred by wholly intrastate carriers for engaging in the same commerce. Cf. *Scheiner*, 483 U.S. at 276, 286, 296-297. The effect could be to place interstate carriers at a competitive disadvantage if they sought to "top off" an interstate load or haul a load between two points in Michigan after completing (or before commencing) an interstate haul. The carrier's interstate transportation could also be adversely affected as a result. The

carry intrastate and interstate loads simultaneously based on the "central and decisive fact" that the business was based in the taxing jurisdiction).

[10] The less demanding test applied to health, safety, and other regulations that impose only "incidental burdens" on interstate commerce likewise requires that a State regulate "evenhandedly." *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

record, however, does not fully establish the extent of any such competitive disadvantage or burden on interstate commerce.[11]

5. However the Court might ultimately resolve any tension between *Scheiner* and the *Osborne* line of cases—and the United States has not arrived at a definitive position on that point—the question presented in No. 03-1230 warrants review. That is especially so because the Michigan Court of Appeals erred by resolving that question by characterizing the fees at issue as "regulatory," and because there is a need for this Court's review of the related question of the validity of Michigan's interstate fee under the SSRS. Indeed, Congress's determination in the SSRS that a fee exceeding $10 for interstate hauls would unduly burden interstate commerce suggests that a charge ten times that amount for "topping off" an interstate load warrants review by the Court. As noted above, this Court has repeatedly granted review in dormant Commerce Clause cases even in the absence of a conflict in the lower courts, and in this instance the lower courts are in need of guidance. See pp. 9-10, 14-15, *supra*.

[11] An affidavit submitted on behalf of petitioner USF Holland (then called TNT Holland Motor Express) states that the company's trucks often supplement their interstate loads by either topping off those loads with intrastate loads, or by hauling intrastate loads between interstate loads. 03-1234 Pet. App. 34. That affidavit suggests that in this inherently mobile industry, interstate and intrastate routes may often be undertaken together as part of a carrier's overall interstate operations. The record does not, however, reflect the overall extent to which Michigan's flat fee actually deters out-of-state carriers from compe[illegible]g for intrastate hauls in Michigan, or the extent to which the fee otherwise affects out-of-state carriers disproportionately or burdens interstate commerce. Accordingly, if the Court grants review in No. 03-1230 and articulates a general framework for analyzing fees such as the one imposed by Section 478.2(1) under the Commerce Clause, the Court may find it appropriate then to remand this case to the Michigan courts for application of that framework, including the development of any further factual record that may be necessary.

C. The Petition In No. 03-1250 Does Not Warrant Certiorari

The petition in No. 03-1250 presents the question whether Michigan's intrastate fee, as applied to *all* carriers conducting intrastate hauls—solely intrastate and mixed carriers alike—is preempted by Section 601 of the FAAAA. That statute prohibits a State from enacting or enforcing any law "related to a price, route, or service of any motor carrier * * * with respect to the transportation of property." 49 U.S.C. 14501(c)(1). Congress enacted that provision to end economic regulation of the trucking industry. See *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 440 (2002). Although Section 601's preemption of economic regulation is broad and important,[12] we do not believe the petition presents a sufficiently substantial issue to warrant review.

In general, the mere levying of a fee is not "related to a price, route, or service of any motor carrier" for purposes of Section 601. 49 U.S.C. 14501(c)(1). In theory, *any* tax or fee might cause a carrier to raise its price or alter its operations, but the same could be said of safety or insurance requirements, or other non-economic regulations, and Congress made clear that it did not intend to sweep so far. See 49 U.S.C. 14501(c)(2) (exempting safety regulation, insurance requirements, and other matters from the scope of Section 601). Without more, therefore, any connection between the assessment of a fee and the prices, rates, or services of a carrier is "too tenuous, remote, or peripheral" to give rise to preemption. *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 390 (1992).

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[12] Congress modeled Section 601 on a similar provision of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 4, 92 Stat. 1708, which this Court has described as "express[ing] a broad pre-emptive purpose." *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992); see H.R. Conf. Rep. No. 677, 103d Cong., 2d Sess. 83 (1994).

Petitioners contend (03-1250 Pet. 16-17) that because Michigan imposed the intrastate fee in support of economic regulation before Congress enacted Section 601, it must now repeal that fee along with the other aspects of its economic regulatory regime. There is no apparent basis for this "guilt by association" theory. Michigan would violate Section 601 if, for example, it were to regulate the prices charged by trucking companies, but that does not mean that otherwise lawful fees charged before deregulation may not be charged after deregulation to support government programs that remain lawful, including safety programs. A different case might be presented if the fee substantially exceeded the amount Michigan required to administer lawful programs, but petitioners failed to develop a record below showing that the fee is not related to a permissible purpose.

It might also be argued that although the fee is lawful as applied to carriers that conduct solely intrastate operations in Michigan, it is preempted as applied to interstate carriers because the fee acts as a barrier to entry, and thereby affects "routes" and inhibits interstate operators from offering "services" for intrastate hauls. But none of the petitioners presented that distinct claim in the state courts or in their petitions to this Court. As a result, it is not suitable for review in this case.

CONCLUSION

The petition for a writ of certiorari in No. 03-1234 should be granted, limited to the question whether the fee imposed by Mich. Comp. Laws Ann. § 478.2(2) is preempted by 49 U.S.C. 14504. The petition for a writ of certiorari in No. 03-1230 should be granted. The petition for a writ of certiorari in No. 03-1250 should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General
PETER D. KEISLER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
DARYL JOSEFFER
Assistant to the Solicitor General
MARK B. STERN
SUSHMA SONI
Attorneys

JEFFREY A. ROSEN
General Counsel
PAUL M. GEIER
Assistant General Counsel for Litigation
DALE C. ANDREWS
Deputy Assistant General Counsel for Litigation
PAUL S. SMITH
Senior Trial Attorney
BRIGHAM A. MCCOWN
Chief Counsel
Federal Motor Carrier Safety Administration
Department of Transportation

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